Mohamed Syed Fathima d/o Shahul Hamid & Ors v MMS Syed Aliyar s/o Shaik Dawood & Ors

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–232 OF 1990
KAMALANATHAN RATNAM J
17 NOVEMBER 2003

Civil Procedure — Damages — Assessment of damages — Whether fourth defendant suffered damage — Whether fourth defendant showed basis for calculating damages

Equity — Maxims of equity — He who seeks equity must do equity — Whether the plaintiffs had breached the provision of law they were relying upon – National Land Code s 343

All the plaintiffs and all the defendants were co-owners of Dawood Restaurant ('the said property'). The said property consists of the ground, first and second floors. The plaintiffs and the fourth defendant lived on the second floor, occupying different areas of space. The plaintiffs filed the application for interlocutory order, which was obtained on 28 June 1990. However, the injunction was discharged on 8 September 1995 when the plaintiffs on their own volition discontinued the suit. The court ordered damages to be assessed and to be paid by the plaintiffs to the defendants. The learned senior assistant registrar assessed the damages on behalf of the fourth defendant on 24January 1998 at RM30,000 with interest at 8% from the date of assessment to full payment. The plaintiffs appealed against the award of RM30,000 as damages and interest and costs, on the basis that since the plaintiffs and the defendants were co-owners of the said property and also business partners of Dawood Restaurant, the fourth defendant had no right to claim damages on the basis that the area was wrongly and/or illegally occupied by the plaintiffs (National Land Code s 343) ('NLC').

Held, dismissing the appeal:

(1) The judge detailed the injunctive orders the plaintiffs had obtained against the defendants and concluded that the injunction was obtained by the plaintiffs when there was contemporaneous dispute over the area the plaintiffs could actually occupy. Thus the plaintiffs used the injunctive order to perpetuate their occupation of an area disputed by the defendants. There were two factors the court had to consider. Firstly, to what extent the fourth defendant was restrained from using the areas he was using and had access to before the ex parte injunction was obtained by the plaintiff. Secondly, the length of time the injunction was held against the fourth defendant which put him to endure much inconvenience and uncertainty (see para 5).

(2) Whilst the plaintiffs have relied on s 343 of the NLC, similarly the plaintiffs ought to have realized that their injunction obtained against the fourth defendant was a violation of that very same s 343 of the NLC that they were relying on. When the areas claimed by the plaintiffs and the defendants were in dispute how could the plaintiffs obtain an injunction to restrain the fourth defendant from trespassing over disputed territory. The plaintiffs have violated the basic maxim of equity – 'he who seeks equity must do equity' (see para 6).

(3) The fourth defendant had to show to the court a basis by which he was claiming damages. The fourth defendant was able, through the valuer, to show the actual rental value of the area occupied by the plaintiff which is RM1500 per month. As a basis to calculate damages, there was nothing wrong in the fourth defendant adopting this method which in fact was the only fair method. The award was fair and reasonable. The fourth defendant has proved to the satisfaction of the court that he has suffered damage and he has also established a basis for calculating the said damages (see para 7).

[**Bahasa Malaysia summary**

Semua plaintif-plaintif dan defendan-defendan adalah pemunya bersama Restoran Dawood ('hartanah itu'). Hartanah itu mempunyai tingkat-tingkat bawah, pertama dan kedua. Plaintif-plaintif dan defendan keempat hidup di tingkat kedua, menghuni tempat lain. Plaintif-plaintif telah memfailkan permohonan untuk perintah interlokutori yang telah diperoleh pada 28 Jun 1990. Walau bagaimanapun, injunksi itu telah dilepaskan pada 8 September 1995 apabila plaintif-plaintif dengan sendiri memberhentikan guaman mereka. Mahkamah telah memerintahkan ganti rugi untuk ditaksirkan dan dibayar oleh defendan-defendan. Penolong kanan pendaftar telah menaksirkan ganti rugi untuk defendan keempat pada 24 Januari 1998 sejumlah RM30,000 dengan faedah pada 8% daripada tarikh taksiran ke tarikh penyelesaian. Plaintif-plaintif merayu terhadap award RM30,000 sebagai ganti rugi dan faedah dan kos pada dasar memandangkan plaintif-plaintif dan defendan-defendan adalah pemunya bersama Restoran Dawood, defendan keempat tidak berhak menuntut ganti rugi pada dasar tempat itu telah dihuni oleh plaintif-plaintif melanggar undang-undang (Kanun Tanah Negara s 343) ('KTN').

Diputuskan, menolak rayuan:

(1) Hakim memperincikan perintah-perintah injunksi yang diperoleh plaintif-plaintif terhadap defendan-defendan dan memutuskan bahawa injunksi diperoleh plaintif-plaintif semasa terdapat pertikaian mengenai tempat yang dapat dihuni plaintif-plaintif. Plaintif-plaintif telah menggunakan perintah injunksi itu untuk terus menghuni tempat yang dipertikaikan oleh defendan-defendan. Terdapat dua faktor yang perlu dipertimbangkan oleh mahkamah. Pertama, setakat mana defendan keempat disekat daripada menggunakan tempat yang beliau menggunakan dan boleh masuk sebelum plaintif-plaintif memperoleh injunksi ex parte itu. Kedua, tempoh masa injunksi itu terhadap defendan keempat yang menyebabkan beliau mengalami kesusahan dan ketidakpastian (lihat perenggan 5).

(2) Memandangkan plaintif-plaintif telah bergantung kepada s 343 KTN, mereka patut mengetahui bahawa injunksi yang diperoleh plaintif-plaintif terhadap defendan keempat merupakan pelanggaran s 343 KTN itu. Memandangkan tempat yang dituntut plaintif-plaintif dipertikaikan bagaimana plaintif-plaintif dapat memperoleh injunksi untuk menyekat

defendan keempat daripada mencerobohi tempat yang dipertikaikan. Plaintif-plaintif telah melanggar pepatah ekuiti – 'he who seeks equity must do equity' (lihat perenggan 6).

(3) Defendan keempat perlu menunjukkan kepada mahkamah satu dasar untuk menuntut ganti rugi. Defendan keempat telah dapat, melalui seorang jurunilai, menunjukkan nilai sewa sebenar yang dihuni oleh plaintif-plaintif iaitu RM1500 sebulan. Sebagai dasar untuk menaksir ganti rugi, tiada apa-apa yang salah untuk defendan keempat menggunakan cara ini yang merupakan cara yang paling adil. Award itu adalah adil dan munasabah. Defendan keempat telah membuktikan kepada kepuasan mahkamah bahawa beliau telah mengalami kerugian dan telah menunjukkan dasar untuk menaksir ganti rugi (lihat perenggan 7).]

Notes

For cases on assessment of damages, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1919-1927.

For cases on the maxim, 'He who seeks equity must do equity', see 6 *Mallal's Digest* (4th Ed, 2002 Reissue) para 2538.

Legislation referred to

National Land Code s 343

Dato' R Rajasingam (Mohd Hussain Ibrahim) (Mohd Hussain Ibrahim & Co) for the plaintiffs.

Thayalan Muniandy (Thayalan & Associates)for the fourth defendant.

Kamalanathan Ratnam J:

Facts

[1] The subject matter of this suit is Dawood Restaurant, No 63 Queen Street, Pulau Pinang ('the said property'). All the plaintiffs and all the defendants are co-owners of the said property together with the estate of one Aminah Ammal, deceased. The said property consists of the ground, first and second floors.

[2] The plaintiffs and the fourth defendant lived on the second floor occupying different areas of space. The plaintiffs complained that all the defendants gave them much trouble and prayed for various injunctive reliefs namely:

(a) restraining the defendants from trespassing into the area of the plaintiffs on the second floor of the said property which consists of an area of 1320/2400 sq ft;

(b) restraining the defendants from interfering in the renovation works of the plaintiffs or intervening in the usage of the area of the plaintiffs,

(c) restraining the defendants from obstructing the entrance to the plaintiffs' premises,

(d) restraining the defendants from destroying the postage letters of the plaintiffs and stealing their belongings,

(e) preventing the defendants from using the staircase leading to the plaintiffs' premises,

(f) restraining the defendants from interfering with the peaceful life of the plaintiffs. The interlocutory order was obtained on 28 June 1990. However the injunction was discharged on 8 September 1995 when the plaintiffs discontinued this suit. The court however ordered damages to be assessed and to be paid by the plaintiffs to the defendants. The learned senior assistant registrar ('SAR') then assessed damages on behalf of the fourth defendant on 24 January 1998 at RM30,000 with interest at 8% from the date of assessment to full payment.

[3] This is the plaintiffs' appeal against the award of RM30,000 as damages and interest and costs.

Findings of the court

[4] It is the plaintiffs' case that since the plaintiffs and defendants were co-owners of the said property and also business partners of Dawood Restaurant, the fourth defendant had no right to claim damages on the basis that the area was wrongly and/or illegally occupied by the plaintiffs and that the plaintiffs are to be charged a monthly rental of RM1,500 based on a valuation report which formed the basis for the learned SAR's assessment. The plaintiffs relied on s 343 of the National Land Code ('NLC') which held that where any land is vested in two or more persons or bodies as co-proprietors, their shares therein shall be deemed to be equal unless different proportions are specified in the memorial of registration. In the circumstances, Dato' Rajasingam pointed out that there has been no finding that the plaintiffs were tenants, thus entitling the defendant to assess damages on the basis of rental.

[5] I have detailed the specific injunctive orders the plaintiffs had obtained against the fourth defendant. The foremost consideration of the court upon an issue such as this is the fact that the ex parte injunction was obtained by the plaintiffs when there was contemporaneous dispute over the area the plaintiffs could actually occupy. The plaintiffs thus used the injunctive orders to perpetuate their occupation of an area disputed by the defendants. Then on their own volition the plaintiffs discontinued the action. The fourth defendant was restrained from using the areas he was using and had access to, before the injunction was obtained. There is affidavit evidence that the fourth defendant could not use the staircase at the rear and had no access to the food lift. He and his family had problems with the use of the toilets. Another factor the court has to consider is the length of time the injunction was held against him and in this case it was five years during which time the fourth defendant must have undergone much inconvenience and uncertainty.

[6] The fourth defendant had adduced evidence that the market rental value of the area occupied by the plaintiffs is RM1,500 per month. To my mind whilst the plaintiffs have relied on s 343 of the NLC to say that there ought to be no rentals between co-owners, similarly the plaintiffs ought to have realized that their injunction obtained against the fourth defendant was a violation of that very same s 343 of the NLC that they are now relying on. When the areas claimed by the plaintiffs and the defendants are in dispute how could the plaintiffs obtain an injunction to restrain the fourth defendant from trespassing over disputed territory. Since injunction is an equitable remedy, the plaintiffs have violated the basic maxim of equity – 'he who seeks equity must do equity'.

[7] The fourth defendant is not claiming rentals. He has to show to the court a basis by which he is claiming damages. Now that the plaintiffs had withdrawn the whole suit after obtaining the injunction, the fourth defendant is however able, through the valuer, to show the actual rental value of the area occupied by the plaintiff which is RM1500 per month. This sum is to be used as a basis for calculating the damages. I agree that there was no arrangement for the plaintiffs to pay the defendants rental or for the defendants to pay the plaintiffs the rentals. But as a basis to calculate damages, I find nothing wrong in the fourth defendant adopting this method which in fact is the only fair method. In my view the fourth defendant would have also been entitled to damages for inconvenience suffered and any other mental anguish he could have suffered. But he has chosen not to make that claim. The fourth defendant calculated damages at RM1,500 for five years amounting to RM90,000. However, since the fourth defendant had pleaded that he was one of the three occupants of rooms in the second floor, he was awarded RM30,000. I find the award fair and reasonable. I am aware of the principle of law that just because an enquiry or assessment has been directed pursuant to an undertaking in an order for an injunction, it does not raise a presumption that damages has in fact been suffered. The onus of proof still lies on the party who asserts that he has suffered damage and it must be proved that the damage was caused by the injunction. I am more than satisfied that the fourth defendant has proved to the satisfaction of the court that he has suffered damages and he has also established a basis for calculating the said damages. I therefore hereby dismiss the plaintiffs' appeal with costs.

Appeal dismissed.

Reported by Rinchen Tee